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No. 02-1541

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Writ of Certiorari to the Supreme Court of Iowa

BRIEF OF THE STATES OF COLORADO, ALABAMA, ALASKA, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAI'I, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MAINE, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Sixth Amendment prohibit enhancement of a current conviction with a prior conviction in which a *pro se* defendant waived counsel and pled guilty, but the trial court did not give a specific and detailed warning about the various ways in which an attorney might be able to assist in the defense?

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INTERESTS OF *AMICI CURIAE*

Amici Curiae are States that oppose the imposition of undue burdens on their ability to establish that a prior waiver of counsel was knowing and intelligent. As a matter of State law, some states already impose higher standards than the Constitution requires. Other States provide the minimum protection mandated by this Court's decisions in *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948), and *Patterson* v. *Illinois*, 487 U.S. 285 (1988). Those cases hold that a defendant's waiver of counsel is knowing and intelligent as long as the defendant is *generally* informed about the right to counsel and understands in general terms the possible consequences of waiving that right. *Id.* at 292-93.

The decision below would impose an added requirement that a defendant wishing to plead guilty be given a new, *Miranda*-type warning advising him of various *specific* ways in which counsel might aid his defense. Only three states have clearly adopted regimes that would satisfy this standard. Guilty pleas from all other states would be at least presumptively invalid under the Iowa Supreme Court's approach.

Amici also oppose the ruling below because it undermines the finality of criminal judgments, with the consequence that numerous prior guilty pleas will be deemed unconstitutional and incapable of being considered in determining whether a defendant has committed crimes in the past. This would make it virtually impossible to administer and apply numerous recidivist statutes. Nationwide adoption of the decision below also would overburden State judicial processes. Trial courts would be forced to maintain transcripts of guilty plea hearings for extended periods. And sentencing judges would be required to expend scarce resources reviewing the validity of prior waivers.

SUMMARY OF ARGUMENT

I. The Iowa Supreme Court was incorrect to hold that respondent' waiver of his right to counsel was invalid under the Sixth Amendment. First, the court's decision totally ignores this Court's consistent teaching that, once a judgment is final, a waiver of counsel is presumptively valid. See, *e.g.*, *Parke* v. *Raley*, 506 U.S. 20, 29-31 (1992). Instead, the Iowa Supreme Court has now held that a waiver of counsel at the guilty plea stage is presumptively invalid, and can be rendered valid only if there was evidence in the record that the trial judge gave three specific warnings. This *per se* approach is contrary to this Court's precedents.

Second, putting aside the presumption of validity mandated by this Court's decisions, the Iowa Supreme Court imposed too high a hurdle for establishing a valid waiver, one that is inconsistent with this Court's precedents. In *Patterson* v. *Illinois*, the Court observed that its right to counsel cases have taken a pragmatic approach, asking what benefits an attorney would provide at the stage of the proceeding under review. 487 U.S. 285, 298 (1988). That case ruled that, at a postindictment interrogation, *Miranda* warnings were sufficient to make a waiver of counsel knowing and intelligent. *Id.* at 293. At the other end of the spectrum, i.e., at trial, this Court has required a searching inquiry to validate a waiver of counsel. See *Faretta* v. *California*, 422 U.S. 806, 835 (1975).

This case falls closer to a postindictment interrogation. Indeed, the skills useful at the plea stage—general advice about the elements of crimes and defenses—are useful at every phase of the process, including postindictment interrogation. Plea colloquies do not require the specialized technical skills that make a lawyer particularly useful at trial. Moreover, the guilty plea litany already provides criminal defendants with substantial information about the

consequences of their actions. This Court's precedents require nothing more.

Third, the Iowa Supreme Court's approach flouts the text and history of the Sixth Amendment. The Founders envisioned a system in which a defendant could choose between the right to self-representation and the right to counsel. In fact, the marked preference during the founding period was self-representation. Yet the Iowa Supreme Court's approach markedly prefers the right to counsel by discouraging people from self-representation.

II. Even if Mr. Tovar could demonstrate that his waiver of counsel was technically insufficient, the Iowa Supreme Court incorrectly concluded that this defect rendered his guilty plea off limits for future enhancements. The Constitution does not preclude the use of even a constitutionally invalid prior conviction for current enhancements as long as the prior conviction is a reliable indicator of the defendant's conduct. See, *e.g.*, *Custis* v. *United States*, 511 U.S. 485, 487 (1994); *Daniels* v. *United States*, 532 U.S. 374, 382 (2001). Given the other procedural protections required for a guilty plea, such a plea is generally a reliable indicator of prior conduct. And the absence of counsel does not make it inherently unreliable.

The record in this case illustrates the point. Here Respondent readily admitted his guilt in open court, and to this day has not recanted or asserted that he had a viable defense that an attorney could have asserted. Because Mr. Tovar's conviction is reliable, it may be used to enhance a future sentence. The Iowa Supreme Court's contrary ruling was based upon a misinterpretation of *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam), and should be reversed.

III. The decision below also undermines the States' interest in the finality of judgments. States have an interest in punishing repeat offenders more severely than first-offenders. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241, 248 (1949);

Parke, 506 U.S. at27. The rule adopted below undermines the States' ability to pursue this interest because it makes vast numbers of guilty pleas unusable for future enhancements. It also imposes a substantial burden on the states to record guilty plea proceedings and to maintain those records practically indefinitely. It precludes judges from applying the presumption of regularity, thereby forcing them to undertake extensive review of prior proceedings before using convictions for current enhancements. And it creates perverse incentives for criminals to forego challenging convictions for relatively modest crimes on direct appeal or via postconviction relief, and instead to leave such challenges to future sentencing hearings.

STATEMENT OF FACTS

Amici adopt the statement of facts in petitioner's brief.

ARGUMENT

The question in this case is whether a prior uncounseled guilty plea can be used to enhance a defendant's punishment in subsequent prosecutions when the defendant now argues that he did not knowingly and intelligently waive his right to counsel before entering that plea. This case is not a direct challenge to the constitutionality of respondent's 1996 guilty plea, as he has never brought an action to vacate that conviction and, at this point, would be barred from doing so. See Pet. App. 19-20 (Carter, J. dissenting) ("Defendant's earlier OWI conviction is still on his record and will remain that way because the statute of limitations for seeking postconviction relief has now run."). Instead, respondent challenges his conviction of an enhanced offense in 2001 on the ground that the enhancement improperly relied upon his 1996 guilty plea, which he alleges is invalid because he did not knowingly and intelligently waive his right to counsel at that time.

Given the posture of this case, this Court must address two independent questions. First, did respondent validly waive his right to counsel when he entered his 1996 guilty plea? Second, even if this waiver was not valid, does that invalidity make enhancement of his later offense constitutionally impermissible? As shown below (in Sections I and II, respectively), respondent fails on both counts. Moreover, as shown in Section III, the Iowa Supreme Court's ruling would render unworkable a wide array of enhanced sentencing systems adopted by the vast majority of States.

I. THE COURT BELOW ERRED IN HOLDING THAT THE SIXTH AMENDMENT INVALIDATES RESPONDENT'S ORIGINAL PLEA.

In the decision below, the Iowa Supreme Court ruled that "a defendant such as Tovar who chooses to plead guilty without the assistance of an attorney must be advised of the usefulness of an attorney and the dangers of self-representation in order to make a knowing and intelligent waiver of his right to counsel." Pet. App. 18. This ruling should be reversed because it runs counter to this Court's waiver of counsel precedents and because it would make a mockery of the text and history of the Sixth Amendment.

A. The Decision Below Ignores This Court's Repeated Teaching That A Waiver Of Counsel In A Prior Conviction That Has Become Final Is Presumed Knowing And Intelligent.

At a most basic level, the decision below ignores this Court's teaching that courts should presume the constitutionality of prior convictions absent a case-specific, factual showing. To be sure, the Court has held that, before a conviction becomes final, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and [do] not presume acquiescence in the loss of fundamental rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (internal quotations omitted); see also *Boykin* v.

Alabama, 395 U.S. 238 (1969) (invalidating a guilty plea where the record provided no evidence that the plea was entered into voluntarily and understandingly).[1] Once a conviction has become final, however, the Court has adhered to the principle that "the judgment of a court carries with it a presumption of regularity." *Johnson*, 304 U.S. at 468. Thus, for example, "[w]here a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel." *Id.* at 468-69.

The Court expressly relied upon this presumption in the analogous case of *Carter* v. *Illinois*, 329 U.S. 173 (1946). There, a defendant pleaded guilty but later, after the conviction became final, challenged his plea on the ground that he had not knowingly waived his right to counsel. This Court rejected his claim because nothing in the record indicated his waiver had not been knowing and intelligent. *Id.* at 177 ("A fair reading of the judgment against Carter indicates a judicial attestation that the accused, with his rights fully explained to him, consciously chose to dispense with counsel."). In *Parke*, the Court articulated the rationale underlying *Carter*, explaining that collateral attacks on prior guilty pleas are disfavored because they "ignore a[] presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments." 506 U.S. at 29, 31.

In this case, Mr. Tovar's 1996 conviction is long since final, and the record shows that he was aware of his right to counsel. Thus, the presumption of regularity acts as the

[1] *Boykin* suggests nothing more than that there must be some evidence to demonstrate that the defendant waived his right to counsel. In that case, the judge did not even inquire whether the defendant was knowingly and voluntarily waiving his right to trial, but instead appears to have accepted the guilty plea without comment or question. 395 U.S. at 239.

proper starting point for analyzing his claim of an invalid waiver of counsel. And *Carter* and *Parke* instruct that Mr. Tovar has the burden to overcome this presumption by demonstrating factually that his waiver was *not* knowing and intelligent.

The Iowa Supreme Court's decision, however, ignores this presumption and instead renders any waiver of counsel at the guilty plea stage *per se* invalid unless the judge gives the defendant three specific warnings. Pet. App. 18. Moreover, the court applied that rule here even though nothing in the record, even today, demonstrates that Mr. Tovar did not make this decision with "eyes open." *Adams*, 317 U.S. at 279.

To the contrary, at the time of the plea, Mr. Tovar was a college student, and therefore was not likely of substantially reduced intelligence. Pet. App. 4. Moreover, the trial court observed at sentencing that he (or more appropriately his parents, who continued to support him) had sufficient means to make him ineligible for appointed counsel. *Id.* at 7. He could have retained counsel at any time. When he appeared in court without counsel, the trial judge noted that he was without counsel and asked whether he wished to waive counsel. *Id.* at 4-5. Mr. Tovar stated that he wished to represent himself, and was then informed of the rights that he would be forfeiting by pleading guilty. *Id.* at 5-6. The judge also explained the minimum and maximum sentences facing Mr. Tovar—including a mandatory forty-eight hours in the local jail. *Id.* at 26. After this colloquy with the Court, Mr. Tovar still maintained his desire to plead guilty, at which point the judge explained the elements of the crime and discussed the facts that proved these elements. *Id.* at 6. To this day, Mr. Tovar has presented no evidence of coercion, confusion, or mistake.[2]

[2] Indeed, Mr. Tovar has not even alleged that had he been so warned, he would have attempted to hire counsel. *See generally* Appellant's Brief and Argument, *Iowa* v. *Tovar*, No. 01-1558 (Iowa filed Mar. 07, 2002).

Accordingly, the presumption of regularity recognized in such decisions as *Carter* and *Parke* should have been dispositive here. The Iowa Supreme Court's failure to acknowledge and apply that presumption is sufficient grounds for reversal.

B. Under this Court's Precedents, A Defendant Can Validly Waive His Right To Counsel Without Knowing The Exact Reasons Why An Attorney Might Be Useful To His Defense.

Aside from ignoring this Court's presumption of regularity for final convictions, the Iowa Supreme Court's ruling requires substantially more than this Court has required in any case other than those dealing with the right to counsel *at trial*.

Since this Court first began considering waivers of the Sixth Amendment right to counsel, the rule has been that a criminal defendant "may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open." *Adams*, 317 U.S. at 279. Deciding whether there has been a knowing and intelligent waiver is a fact-intensive, case-specific task. See, *e.g.*, *Johnson*, 304 U.S. at 464; *Adams*, 317 U.S. at 278.

Accordingly, this Court has not articulated a formulaic rule that applies in every situation. Instead, as the Court noted in *Patterson* v. *Illinois*, 487 U.S. 285 (1988), the Court has:

> taken a more pragmatic approach to the waiver question—asking what purposes a lawyer can serve at the particular stage of the proceeding in question, and what assistance he could provide to an accused at that stage—to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.

Thus, he has failed to establish any prejudice from the failure to provide the warnings mandated by the court below.

Id. at 298.

In *Patterson*, the Court faced the question of what information a criminal defendant needed to waive his right to counsel during a post-indictment interrogation. The Court simply asked: "Was the accused . . . made sufficiently aware of his right to . . . counsel . . . and of the possible consequences of a decision to forgo the aid of counsel?" *Id.* at 292-93. Ultimately, the Court ruled that, if the defendant waived his right to counsel after receiving *Miranda* warnings, the waiver was necessarily knowing and intelligent. *Id.* at 293. The Court noted that these warnings fully informed the defendant of his rights and conveyed the consequences of not invoking those rights (i.e., that anything he said could be used against him at trial). *Id.* at 293-94. The Court observed that the role of an attorney at a postindictment interrogation is limited—it is merely to advise the defendant "what questions to answer and which ones to decline to answer." *Id.* at 294 n.6. And the Court expressly distinguished postindictment questioning from trial, noting that "[a]t trial, an accused needs an attorney to perform several varied functions—some of which are entirely beyond even the most intelligent layman." *Id.*.

At the opposite end of the spectrum, the Court addressed the requirements for waiver at trial in *Faretta* v. *California*. There, the Court noted that "[w]hen an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." 422 U.S. at 835. Accordingly, "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* (quoting *Adams*, 317 U.S. at 279).

Even in that context, moreover, the Court did not require any specific questions or admonishments to make a criminal defendant aware of these "dangers and disadvantages." Instead, the Court concluded that the trial judge had fulfilled

his responsibility by warning Mr. Faretta that he thought it a mistake not to accept counsel and by explaining that he would be required to follow the "ground rules" of trial procedure. *Id.* at 835-36. Thus, for a valid waiver of the right to counsel *at trial,* the court need do no more than provide general advice against waiver and admonishment that the defendant will be required to follow accepted procedure.

This case falls between these two extremes, involving, as it does, the decision of a criminal defendant to plead guilty. Accordingly, such a proceeding cannot possibly require *more* than this Court held in *Faretta* was necessary for a valid waiver of counsel at trial.

In all events, the Iowa Supreme Court incorrectly assumed that an attorney would be particularly useful at the guilty plea stage because an attorney would understand the elements of the alleged crime and its defenses, which would allow for a better assessment of whether the defendant should plead guilty. See Pet. App. 18. In fact, however, this general background knowledge of criminal law would be useful to a criminal defendant at *every* stage of the proceeding, from investigation through trial. Indeed, in the post-indictment interrogation at issue in *Patterson*, knowledge of the elements of crimes and their defenses would, no doubt, animate the directions an attorney would give a client. Standing alone, therefore, those skills cannot distinguish a post-indictment interrogation from a plea hearing.

Indeed, in some ways, a criminal defendant needs an attorney *less* at a guilty plea hearing than during a post-indictment interrogation. A plea hearing is a formal judicial proceeding, and few, if any, defendants will misjudge the gravity of the affair. Additionally, before pleading guilty, a defendant is provided with a wealth of information. The judge must explain exactly what rights a defendant is giving up by pleading guilty, including his Fifth and Sixth Amendment procedural rights. See *Boykin*, 395 U.S. at 243. Judges must also explain the punishment range and the

elements of the crime. See *Henderson* v. *Morgan*, 426 U.S. 637, 647 (1976); see also Iowa R. Crim. P. 2.8; Fed. R. Crim. P. 11. After providing this information, the judge must then be satisfied that there are sufficient facts to demonstrate that the defendant committed the crime and that no unlawful coercion has led to the plea. If any defendant begins a guilty plea hearing failing to grasp the gravity of the situation, this colloquy with the judge will surely underscore the seriousness of the proceeding.

By contrast, although a defendant in a post-indictment interrogation must be informed of his *Miranda* rights, he need not be informed of the elements of the crime with which he is charged. See *Patterson*, 487 U.S. at 294-95 (explaining that defendant was told of the charge but not indicating that he was informed of the elements of the crime). Nor do *Miranda* warnings necessarily make a defendant aware that what he says might undermine a possible defense. Moreover, such interrogations are markedly more informal than plea hearings, which might make defendants underestimate their gravity.

In the end, then, the skills that an attorney could use to help a defendant at the guilty plea stage are practically the same as those that make an attorney useful during a police interrogation.

By contrast, an attorney must bring a whole different set of skills to be effective at trial. She must be well versed in procedure and evidence. *Id.* at 299 n.13 ("But at trial, counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire*, examine and cross-examine witnesses effectively (including the accused), object to improper prosecution questions, and much more."). And she must be persuasive. These specialized legal skills, which few if any laymen are likely to possess, make an attorney very useful, perhaps indispensable, at trial. But these specialized skills are far less useful at the plea stage, as the procedure is simple and there is no one to persuade.

Thus, under the *Patterson* analysis, it is sensible to treat trials differently because the skills needed to navigate a trial are likely possessed only by attorneys. Because an attorney is so crucial at trial, this Court has reasonably required a judge to engage in a searching inquiry to ensure that a defendant's waiver of counsel at trial is knowing and intelligent. But that rationale does not apply to plea proceedings any more than police interrogations.

The Sixth Amendment, therefore, cannot be said to require more than an assurance that the defendant was generally informed of his right to counsel and the consequences of waiving that right. Mr. Tovar was so informed.

C. The Iowa Supreme Court's Opinion Flouts The Text And History Of The Sixth Amendment.

The decision below also flouts both the text of the Sixth Amendment and the history of the right to counsel. That history demonstrates that, if anything, the Sixth Amendment favored a system of self-representation but provided defendants with an option to be represented by counsel. It was not designed to impose any procedural requirements for waiver of the right to counsel.

To be sure, this Court departed from this understanding of the Sixth Amendment some seventy years ago in *Johnson* v. *Zerbst*, where this Court first began to require a heightened showing of the intent to voluntarily waive the right to counsel. 304 U.S. at 464. Nevertheless, in deciding whether to impose an additional procedural requirement, it is important to bear in mind the pertinent textual and historical evidence.

1. The Sixth Amendment says only that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend VI. The language of the Amendment does not require that the government take any action to ensure that a defendant is even aware of his right to representation by counsel—only that the government not

interfere with that right. Indeed, the text of the Sixth Amendment "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta*, 422 U.S. at 819.

The most telling aspect of the Amendment's text is that it speaks of the *assistance* of counsel. As this Court has previously recognized, "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Id.* at 820. The language of the Amendment, then, sets up a system in which the accused has responsibility for choosing among the many tools available for his defense, including the right to counsel. The Amendment's text, therefore, provides no basis for requiring a judge to admonish the defendant that refusing counsel is a poor choice, or of the reasons it might be a poor choice.

2. Nor do the Sixth Amendment's historical roots justify the rule adopted by the Iowa Supreme Court. Throughout the colonial and revolutionary periods, the right to counsel was not fully recognized by English law. To the contrary, "the law of England permitted a prisoner to be heard by counsel in misdemeanor and treason cases only. In ordinary felony cases the participation of counsel was prohibited." Francis H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 109 (1951) ("Heller, *Sixth Amendment*"); see also *Powell* v. *Alabama*, 287 U.S. 45, 60 (1932). Thus, the Framers' intent in adopting the Sixth Amendment's right to counsel, "was clearly to abrogate this perverse English common law rule by constitutional amendment and to provide the defendant with the right to be represented by counsel, presumably of his own choice and at his own expense." B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged With Misdemeanors Entitled To Court Appointed Counsel?*, 5 Roger Williams U.

L. Rev. 417, 425-26 (2000); *accord United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891); Heller, *Sixth Amendment* 109.

But nothing in the history of the Sixth Amendment suggests an intention to impose procedural obstacles to the waiver of counsel. To the contrary, the development of the right to counsel in Colonial America reflects a general distrust of lawyers. As this Court recognized in *Faretta*:

> The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers. When the Colonies were first settled, 'the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions.'

422 U.S. at 826 (quoting C. Warren, *A History of the American Bar* 7 (1911)).

This conclusion is supported by early guarantees of liberty in the American Colonies. The first recognition of a right to counsel in America came in 1641, when the Massachusetts Body of Liberties proclaimed:

> Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines.

Massachusetts Body of Liberties, *Rites Rules and Liberties concerning Juditiall proceedings* ¶ 26 (1641), *reprinted in* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 71-84 (1971). This was a revolutionary development, that is, "to recognize that individual liberty depended, in the last resort, upon the courts, and to provide in detail for the rights of litigants and accused in judicial proceedings was as

perceptive as it was unprecedented at that time." Bernard Schwartz, *The Great Rights of Mankind* 37 (1977). Noticeably, however, the Bill of Liberties would not allow counsel to be paid, consistent with the general notion at the time that "'it shall be a base and vile thing to plead for money and reward.'" Heller, *Sixth Amendment* 19 (quoting Carolinas' Fundamental Constitutions, Art. 70); see also The Concessions and Agreements of the Proprietors, Freeholders, and Inhabitants of the Province of West New Jersey ch. XXII (1677), *reprinted in* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 129 (1971) ("no person or persons shall be compelled to fee any attorney or counciller to plead his cause, but that all persons have free liberty to plead his own cause, if he please.").

Between these early statements and the adoption of the Sixth Amendment in the late Eighteenth Century, the general practice of allowing counsel to plead cases for defendants slowly gained acceptance. As a result, by the time the Bill of Rights was adopted, twelve of the thirteen colonies had renounced the English common-law rule. Heller, *Sixth Amendment* at 109. At the same time, however, "even where counsel was permitted, the general practice continued to be self-representation." *Faretta*, 422 U.S. at 828 (citing H. Rankin, *Criminal Trial Proceedings in the General Court of Colonial Virginia* 89-90 (1965)).

After reviewing this history, this Court has previously concluded that "there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel." *Id.* at 832. In the end, then, the drafters of the Sixth Amendment were intent on protecting a system in which the accused could choose between self-representation and counsel. There is no reason to believe they meant to prefer counsel or to impede a defendant's choice of self-representation.

In short, the Iowa Supreme Court's ruling should be overturned because it runs afoul of this Court's precedents and because it cannot be justified by reference to the Sixth Amendment's text or history.

II. THE DECISION BELOW ERRED IN HOLDING THAT AN INVALID WAIVER NECESSARILY MAKES A GUILTY PLEA UNUSABLE FOR FUTURE ENHANCEMENTS.

Even if Respondent could establish that his Sixth Amendment rights were violated at the time of his conviction, that would not be the end of the inquiry. For he must also establish that such an invalid conviction cannot be used to enhance a prior conviction. The Iowa Supreme Court interpreted this Court's decisions in *Baldasar* v. *Illinois*, 446 U.S. 222, 226 (1980), and *Nichols* v. *United States*, 511 U.S. 738, 748-49 (1994), to mean that if Mr. Tovar did not validly waive counsel in his 1996 guilty plea, that conviction could not constitutionally be used to enhance his current sentence. See Pet. App. 3 (Iowa Supreme Court ruling) (citing *Baldasar*, *Nichols*, and *State* v. *Cooper*, 343 N.W.2d 485, 486 (Iowa 1984), a state case that relied heavily upon *Baldasar*). Because the Iowa Supreme Court's decision on this question was based in federal constitutional law, this Court has the authority to evaluate whether the Iowa Supreme Court correctly interpreted federal law in reaching its conclusion.[3]

It did not. Under this Court's precedents a sentencing judge may consider *all* reliable evidence in deciding what punishment to impose on a defendant. Accordingly, a sentencing judge may use even an invalid conviction as long

[3] This conclusion is not undermined by the fact that an Iowa statute requires that prior convictions used to enhance a later offense be proved beyond a reasonable doubt. *See State* v. *Talbert*, 622 N.W.2d 297, 301 (Iowa 2001). The existence of Mr. Tovar's conviction was proved beyond a reasonable doubt; he does not challenge that. He merely claims that, as a matter of constitutional law, this conviction may not be used for enhancement purposes. *See* Pet. App. 3-4.

as the defendant was not wholly denied the right to counsel *at trial*, thereby rendering his conviction inherently unreliable.

A. The Iowa Supreme Court Misinterpreted This Court's Precedents, Which Allow Prior Convictions To Be Used To Enhance Sentences As Long As They Are Reliable.

Contrary to the Iowa Supreme Court's conclusion, this Court's precedents hold that the Constitution precludes the use of a prior conviction for enhancement only if that conviction is an unreliable indicator of prior conduct. Respondent cannot demonstrate that his prior guilty plea is unreliable for that purpose.

1. In *Williams* v. *New York*, 337 U.S. 241 (1949), this Court clearly pronounced that at sentencing a trial judge may consider a wide array of information that may not appropriately be considered in deciding a defendant's guilt:

> A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

Id. at 247. The Court also noted that current sentencing philosophy requires judges to consider more than the crime because "the punishment should fit the offender and not merely the crime." *Id.* The trial judge must, therefore, be allowed to consider a wide range of facts to best tailor the punishment to the case subject only to the requirement that it not allow materially untrue facts to affect the sentence. See *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948) ("this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result,

whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.").

Although decided over fifty years ago, *Williams* and *Townsend* remain the touchstones for analysis of the constitutionality of criminal sentences in non-capital cases. See 5 LaFave et al., *Criminal Procedure* § 26.4(a) (2d ed. 1999); see also *United States* v. *Grayson*, 438 U.S. 41, 45-50 (1978) (reaffirming *Williams'* central premise that judges may consider all relevant, reliable information at sentencing); *United States* v. *Watts*, 519 U.S. 148, 151-52 (1997) (same); *Apprendi* v. *New Jersey*, 530 U.S. 466, 481 (2000) (indicating that *Williams* is still good law for non-capital cases in which the judge sentences a defendant within the statutory range). Thus, according to this line of cases, the Iowa sentencing court was, under the Constitution, allowed to consider all reliable, relevant information.

2. Commensurate with the principle that the sentencing judge is entitled to consider virtually any information about a criminal defendant, this Court has generally been very suspicious of attempts to attack prior convictions at current sentencing proceedings. Indeed, the Court has repeatedly held that, as a general rule, the Constitution does not require that defendants be allowed to make such collateral attacks. See, *e.g.*, *Custis* v. *United States*, 511 U.S. 485, 487 (1994); *Daniels* v. *United States*, 532 U.S. 374, 382 (2001); cf. *Parke*, 506 U.S. at 29-30 (given the "presumption of regularity" that attaches to final judgments, a state is free to place the burden of showing the invalidity of a prior conviction on the defendant). This rule is based on the "interest in promoting the finality of judgments." *Custis*, 511 U.S. at 497. Indeed, "[t]hese principles bear extra weight in cases in which the prior convictions . . . are based on guilty pleas, because when a guilty plea is at issue, 'the concern with finality served by the limitation on collateral attack has special force.'" *Id.* (quoting *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979)).

This result is not surprising given the Court's holding in *Williams* that all information about the defendant is relevant to the sentencing decision. Even if a prior conviction is constitutionally infirm, it is relevant because it conveys some information about the defendant's past conduct.

Of course, this Court has recognized an exception to this general rule when the constitutional violation alleged is based on a denial of the right to counsel at trial, as in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). That exception has been acknowledged in decisions such as *Burgett* v. *Texas*, 389 U.S. 109 (1967) (prior conviction after trial could not be used in defendant's current prosecution where the defendant was not afforded counsel); *United States* v. *Tucker*, 404 U.S. 443, 444-45 (1972) (defendant was entitled to re-sentencing after two of his prior convictions were vacated on the grounds that he had not been advised of, and did not validly waive, his right to legal assistance); *Loper* v. *Beto*, 405 U.S. 473 (1972) (plurality) (prior uncounseled convictions could not be used to impeach a defendant).

The reason for the *Burgett/Tucker* exception is, no doubt, this Court's belief that a conviction achieved in violation of *Gideon* is not a reliable indicator of past conduct. Indeed, in *Loper*, this Court explained that: "'[t]he absence of counsel impairs the reliability of such convictions. . . .'" *Id.* at 483 (quoting *Gilday* v. *Scafati*, 428 F.2d 1027, 1029 (1970)).

By contrast, in *Lewis* v. *United States*, this Court held that a prior conviction based on a guilty plea without a valid waiver of counsel *could* serve as the prerequisite felony for the federal felon-in-possession statute, 18 U.S.C. § 1202(a)(1). *Lewis*, 445 U.S. 55, 67 (1980). The Court noted that the situation there was different from *Burgett*, *Tucker*, and *Loper* because "[i]n each of these cases, this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction." *Id.*; see also *Strickland* v. *Washington*, 466 U.S. 668, 691-92 (1984) ("The purpose of

the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to *justify reliance on the outcome of the proceeding.*") (emphasis added); *Custis*, 511 U.S. at 496 ("failure to appoint counsel for an indigent defendant was a unique constitutional defect;" and ineffective assistance of counsel does not "rise[] to [that] level").

In sum, the teaching of this Court's rulings is that prior convictions may be used to enhance a defendant's sentence so long they are reliable indicators of the defendant's prior conduct.[4]

B. Uncounseled Guilty Pleas Are Not Inherently Unreliable.

As noted above, *Burgett* and *Tucker* dealt with allegations of the deprivation of the right to counsel *at trial*. This Court has long realized that even the most intelligent layman stands little chance of succeeding at trial. See *Powell*, 287 U.S. at 69; *Patterson*, 487 U.S. at 299 n.13. Indeed, even an innocent defendant often will not be able to present a sufficient defense at trial in light of the technical rules of procedure and evidence. Thus, when faced with a trial conviction of an uncounseled defendant, a court cannot adequately convince itself that the conviction was the result of the defendant's guilt and not his incompetence at trial. Such wholly uncounseled trial convictions are, therefore, inherently

[4] Neither *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam) nor *Nichols* v. *United States*, 511 U.S. 738 (1994), undermines this principle. Those cases dealt with a wholly different question stemming from this Court's "actual imprisonment" standard for the right to counsel in misdemeanor cases. The question was whether the use of uncounseled convictions — which were valid at the time of conviction because the defendant was not sentenced to imprisonment — became invalid if used to enhance future sentences. *Baldasar* held that such use of these uncounseled convictions rendered them invalid. 446 U.S. at 224. This Court later rejected this conclusion in *Nichols*. 511 U.S. at 748. Noticeably, in *Nichols*, this Court cited *Burgett*, *Tucker*, and *Williams*. *Id.* at 743 n.9, 747. Thus, nothing in *Baldasar* or *Nichols* alters the rule that even an invalid conviction can be a reliable indicator of past conduct.

unreliable indicators of guilt. Because they are unreliable, this Court has indicated that the Constitution requires that they not be considered in subsequent sentencing proceeding. See *Townsend*, 334 U.S. at 741.

By contrast, in a case such as this one in which a defendant waived his right to counsel at a guilty plea hearing after being duly informed of this right, the situation is different. First, a judge generally will not accept a guilty plea unless the defendant is willing to admit his guilt after being fully apprised of his right to plead not guilty and all of the concomitant rights that would come with a trial. See, *e.g.*, *Boykin*, 395 U.S. at 243; *Henderson*, 426 U.S. at 647. Moreover, a judge will not accept a guilty plea unless satisfied that there is sufficient factual evidence to support a finding of guilt.[5] Thus, when a judge accepts a guilty plea (whether counseled or uncounseled), there is little reason to doubt that the defendant did, in fact, commit the crime. The very acceptance of the plea, then, demonstrates some level of reliability.

Mr. Tovar's case provides an apt example. After he was informed of his rights and the possible punishment he faced, he admitted in open court that he was, in fact, driving and did not contest that his blood alcohol level was well above the legal limit. Pet. App. 6. He therefore admitted that he committed a crime, and the judge found sufficient evidence to support this conclusion. There is little concern that his conviction is not a reliable indication that he committed a crime, whether or not he might have escaped conviction if he had retained a lawyer.

If the language of *Burgett*, *Tucker*, and *Loper* left any doubt that a guilty plea following a waiver of counsel could be used to enhance a future sentence, that doubt was removed by

[5] In the case of so called "Alford pleas", the defendant need not admit his guilt because he is entering a guilty plea to avoid a potentially higher sentence. *See generally North Carolina* v. *Alford*, 400 U.S. 25 (1970). Such pleas are irrelevant to this case because Mr. Tovar admitted his guilt.

Custis. There, the Court held that a defendant could not collaterally attack his conviction on ineffective assistance of counsel grounds. 511 U.S. at 496; *accord Lackawanna County Dist. Attorney* v. *Coss*, 532 U.S. 394 (2001). A claim of ineffective assistance of counsel surely calls the reliability of the underlying conviction into doubt to some extent, but this was not deemed enough to render such a conviction off limits for future sentencing.

The alleged violation in this case does nothing to call Mr. Tovar's guilt into doubt. Accordingly, the Constitution does not exclude Mr. Tovar's prior guilty plea from his 2001 prosecution, even if his waiver of counsel was a technical violation of the Sixth Amendment. The Iowa Supreme Court's contrary ruling should be reversed.

III. THE DECISION BELOW UNDERMINES THE STATES' INTEREST IN THE FINALITY OF JUDGMENTS AND WOULD INTERFERE WITH THE OPERATION OF ENHANCED SENTENCING SYSTEMS NATIONWIDE.

As a policy matter, the decision below would also undermine the States' powerful interest in the finality of criminal judgments. This Court has recognized that interest in numerous contexts. For example, in *Lackawanna County*, this Court explained that "[o]nce a judgment of conviction is entered in state court," and once direct appeal and state and federal postconviction remedies have been exhausted or waived, "the defendant's conviction becomes final and the State that secured the conviction obtains a strong interest in preserving the integrity of the judgment." 532 U.S. at 402-03. The Court then noted that "[o]ther jurisdictions acquire an interest as well, as they may then use that conviction for their own recidivist sentencing purposes, relying on the 'presumption of regularity' that attaches to final judgments." *Id.* at 403 (citations omitted). Accordingly, the Court went on to hold that "once a state conviction is no longer open to direct or collateral attack in its own right because the

defendant failed to pursue those remedies while they were available . . . the conviction may be regarded as conclusively valid." *Id.*

The Iowa Supreme Court ignored this important interest in finality. As a result, its decision, if affirmed, would have untoward effects on the administration of justice throughout the Nation. Indeed, it would make the administration of recidivist statutes very difficult.

1. This Court has long recognized that states have a valid interest in punishing repeat criminals more severely. See, *e.g.*, *Williams*, 337 U.S. at 248; *Parke*, 506 U.S. at 27. Indeed, such graduated sentencing regimes "have a long tradition in this country that dates back to colonial times." *Parke*, 506 U.S. at 26. States and the federal government have adopted various forms of sentencing regimes that punish recidivists more harshly, including statutes that specifically ratchet up the applicable punishment range for each subsequent offense, see, *e.g.*, Iowa Code §§ 123.46, 123.91 (increased punishment for subsequent public intoxication offense); Colo. Rev. Stat. § 18-6-801(7) (enhanced penalty for repeated domestic violence convictions); *id.* §§ 18-18-405, -406, -407 (enhanced penalties for repeated drug offenses); 21 U.S.C. §§ 842, 843, 844a, 849, 851 (enhanced punishment for subsequent drug offenses).

More generally, the vast majority of American sentencing law calls on the judge to consider the defendant's criminal history. Under the Federal Sentencing Guidelines, for example, one of the key factors contributing to the sentence imposed is the defendant's criminal history score. See, *e.g.*, Federal Sentencing Law & Practice ch. 4, pt. A, cmt. (2003); see also Colo. Rev. Stat. § 18-1.3-401(6).

If this Court were to affirm the ruling below, it would create a new rule that permits a criminal defendant to challenge the use of a prior conviction—long since final and no longer subject to direct or collateral attack—to enhance his

current sentence. Even assuming this rule would apply only to future prosecutions, it would have widespread effects on the criminal justice system. In future prosecutions where the prosecution cannot show compliance with the new rule, the guilty plea could not be used to enhance the current sentence.

Adopting the Iowa Supreme Court's rule would thus frustrate the States' legitimate attempts to punish recidivists more severely than first-time offenders. Indeed, a large number of states have expressly adopted rules that require less searching inquiry than that required by the court below. *See* Resp'ts Br. In Opp'n To Cert. at 10 (stating that Louisiana, Michigan, South Dakota, and Texas do not require *Faretta*-style inquiries for guilty pleas); *id.* at 11 (describing the regimes in Nevada, California, Illinois, North Carolina, and Vermont as adopting a variance of the *Von Moltke* rule, but not asserting that these jurisdictions require the judge to give the admonishments now required by the Iowa Supreme Court). Under the Iowa Supreme Court's ruling, any uncounseled guilty plea from any of these states would be presumptively invalid and could not be used to enhance any future sentence.

In this regard, Mr. Tovar is wrong in contending that States that require *Faretta*-style advisements in *pro se* guilty pleas have necessarily met the standard set by the Iowa Supreme Court. *Id.* at 13. For example, Florida appears to have adopted *Faretta*, but nothing in its rule governing the waiver of counsel or in court opinions interpreting it require the trial judge to give the specific admonishments that the Iowa Supreme Court opinion now would require. See Fla. R. Crim. P. 3.111(d)(2)(before accepting a waiver of counsel, "the court shall advise the defendant of the disadvantages and dangers of self-representation"); *Clary* v. *State*, 818 So. 2d 686 (Fla. Dist. Ct. App. 2002) (reversing for the failure to conduct a *Faretta*-style inquiry but not requiring any specific admonishments). Uncounseled guilty pleas from Florida, therefore, may very well not meet the requirements of the

Iowa Supreme Court, rendering them off limits for future sentencing enhancement. The same will be true with most every State because even those States that require a more searching inquiry do not require the specific warnings that the Iowa Supreme Court has now held *must* be given.[6]

Indeed, a close examination of state-law precedent from around the country demonstrates that guilty pleas from only three states—Minnesota, Oregon, and Pennsylvania—would satisfy the Iowa Supreme Court's ruling. See App. of State Authorities. No other state appears to require that a trial judge give these specific warnings, and almost every state recognizes that deciding whether a defendant knowingly and intelligently waived his right to counsel requires a fact-specific inquiry—an inquiry that takes precedence over any formulaic instructions from the trial judge.[7] *Id.* Thus, the Iowa Supreme Court's rule would invalidate virtually every uncounseled guilty plea nationwide.

Rendering the vast majority of guilty pleas unusable for future sentencing enhancement would clearly have a large impact on the administration of justice. A large number of criminal defendants plead guilty and many do so without the aid of counsel. See *United States* v. *Ruiz*, 536 U.S. 622, 632 (2002) (90 percent or more of the federal criminal cases are

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[6] The same is likely true of the states that "prefer their courts to go into detail regarding the usefulness of an attorney." Resp't's Br. In Opp'n To Cert. at 12. Alaska, for example, encourages its courts to give these instructions, *see Swenson* v. *Municipality of Anchorage*, 616 P.2d 874, 878 n.4 (Alaska 1980), but it has upheld convictions obtained at trial where these instructions were not given. *See Williams* v. *State*, 616 P.2d 881, 882-82 (Alaska 1980). Guilty pleas in Alaska, then, will not necessarily satisfy the Iowa Supreme Court's new rule.

[7] Colorado and certain other states have adopted stringent waiver requirements, but none of these states has adopted the Iowa Supreme Court's required trilogy. *See generally* App. of State Authorities. Moreover, almost every state holds that a waiver made in violation of their standards can still be knowing and intelligent based upon the totality of the circumstances. *See* App. (discussion of Colorado, District of Columbia, New Jersey, Oregon).

plea bargained); see also Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* 1, 7, tbl.14 (Bureau of Justice Statistics, November 2000) (stating that nearly thirty percent of inmates accused of public order offenses in the nation's 75 largest counties report that they represented themselves). The Iowa Supreme Court's ruling would thus preclude the operation of enhanced sentencing systems in a large number of cases.

2. If affirmed, the decision below would also place a great strain on judicial resources. First, it would require courts to create voluminous records. Under the rule adopted below, a prior uncounseled guilty plea can be used for sentencing enhancement only if the state demonstrates that the trial judge gave at least three specific instructions over and above the litany required before a guilty plea. However, as this Court observed in *Nichols*, "a large number of misdemeanor convictions take place in police or justice courts which are not of record;" thus, memorializing warnings prior to entry of a guilty plea by a pro se defendant would require a "drastic change in the procedures of these courts." 511 U.S. at 748. Even in courts of record, states do not routinely create transcripts. In Colorado, for example, transcripts are usually generated only when the defendant requests them on direct appeal.

Further, the decision below would require courts to maintain records of plea colloquies indefinitely, thereby requiring states to maintain archives of ancient transcripts that are now not routinely kept for an extended period of time. See, *e.g.*, *United States* v. *Hartsock*, 347 F.3d 1 (1st Cir. 2003) (states routinely destroy supporting records). Therefore, requiring the government to shoulder the burden of persuasion would place "'an impossible burden on the prosecution to establish the existence of facts within the special knowledge of the defendant.'" *Id.* at 7 (quoting LaFave, *Substantive Criminal Law*, § 1.8 (1986)). Moreover, states would need to create methods for sharing these

transcripts from state to state, so that a criminal's out-of-state convictions could be considered as part of his sentencing. See *Parke*, 506 U.S. at 28 (noting that studies suggest that up to two-thirds of those arrested have criminal records, often from other jurisdictions).

In addition to the logistical problems with maintaining the hearing transcripts, the Iowa Supreme Court's approach would drain judicial resources by requiring courts to conduct in-depth analysis of prior guilty pleas before they can be used for sentence enhancement. Indeed, a judge would be required to procure the transcript from whatever jurisdiction has it, and then review it to ensure that the judge in the prior proceeding gave the appropriate admonishments. This exercise would, no doubt, occupy a good deal of judicial resources. See, *e.g.*, 2 David Rossman, *Criminal Law Advocacy: Guilty Pleas* ¶ 6.06, at 6-51 (2003) (collateral attacks can require "examining incomplete records from far away jurisdictions in cases long ago closed and forgotten. The practical problems of finding the facts to support or refute a claim about the validity of a plea in such conditions are immense."); *accord Lackawanna County*, 532 U.S. at 403.

3. Holding that a defendant may collaterally challenge a prior guilty plea on the ground that it was not made knowingly and intelligently would also undermine incentives for defendants to raise these issues in the proper forum—direct appeal and state and federal postconviction relief proceedings. As this Court has recognized, our system provides a defendant many opportunities to challenge the constitutionality of his conviction—direct appeal, post-conviction proceedings under state law, and federal habeas proceedings. *Daniels*, 532 U.S. at 381. Forcing defendants to raise claimed constitutional violations in these proceedings is advantageous because it allows the defendants to vindicate their constitutional rights while still allowing the State to preserve its interest in punishing the guilty and imposing harsher penalties on repeat offenders.

This case presents an apt example. Had Mr. Tovar attacked the validity of his waiver of counsel on either direct appeal or postconviction relief, the remedy, if he succeeded, would have been an order vacating his guilty plea. See Iowa Code § 822.7. This would have vindicated his constitutional right. But it would also have returned the parties to their pre-guilty-plea position, allowing them to proceed again without the constitutional error. Iowa would have been free to proceed to trial on the charges. Thus, the State would have been able to vindicate its interest in punishing those who commit crimes.[8]

Were Respondent to succeed in this case, however, his prior guilty plea could not be considered in his present or future sentencing. But the State of Iowa would never be able to remove the taint of such a ruling because, until Mr. Tovar's previous conviction is vacated, a new prosecution is not allowed. See U.S. Const. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). Thus, regardless of the strength of the State's evidence against Mr. Tovar, the State would never be able to remedy the constitutional problem and vindicate the State's interest in punishing the guilty (or in this case subjecting recidivists to increased punishment). A reversal of the decision below will force defendants to raise their claims either on direct appeal or via a postconviction relief proceeding, and thereby give prosecutors a fair opportunity to vindicate the public's interest in ensuring that the guilty are punished and that recidivists are punished more severely.

In sum, the decision below would seriously undermine the States' important interest in the finality of criminal convictions. Such a rule should therefore be implemented, if at all, as a matter of state law, and not as a matter of federal constitutiona! law.

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[8] Indeed, given that the uncontroverted evidence demonstrated that Mr. Tovar was driving while his blood alcohol content was .194 percent, Iowa would, no doubt, have initiated new proceedings had Mr. Tovar successfully had his guilty plea vacated.

CONCLUSION

For these reasons, the decision of the Supreme Court of Iowa should be reversed.

Respectfully Submitted,

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APPENDIX

APPENDIX OF STATE AUTHORITIES

Alabama: Ala. R. Crim. P. 6.1 ("A defendant may waive his or her right to counsel in writing or on the record, after the court has ascertained that the defendant knowingly, intelligently, and voluntarily desires to forgo that right."); *Ex Parte Reese*, 620 So. 2d 579, 581 (Ala. 1993) (finding requirements of Rule 6.1 were not met where there was no evidence that trial judge engaged in a colloquy to ensure that the waiver was knowing, intelligent, and voluntary but not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

Alaska: Alaska R. Crim. P. 39(a) ("The court shall advise a defendant who appears without counsel for arraignment, change of plea, or trial of the right to be represented by counsel, and ask if the defendant desires the aid of counsel. The court shall not allow a defendant to proceed without an attorney unless the defendant understands the benefits of counsel and knowingly waives the right to counsel."); *Id.* 39(b)(4) ("In the absence of a request by a defendant otherwise entitled to appointment of counsel, the court shall appoint counsel unless the court finds that the defendant understands the benefits of counsel and knowingly waives the right to counsel."); *Williams* v. *State*, 616 P.2d 881, 882-83 (Alaska 1980) (affirming conviction of uncounseled defendant at non-jury trial where trial judge did not give the admonishments now required by the Iowa Court).

Arizona: Ariz. R. Crim. P. 6.1(c) ("A defendant may waive his or her rights to counsel under (a) and (b), in writing, after the court has ascertained that he or she knowingly, intelligently and voluntarily desires to forego them."); *State* v. *Natoli*, 158 Ariz. 525, 527, 764 P.2d 10, 12 (1988) (upholding use of prior uncounseled conviction for enhancement purposes even when there was no evidence of specific admonishments).

Arkansas: *King* v. *State*, 304 Ark. 592, 595, 804 S.W.2d 360, 361-62 (Ark. 1991) (noting that on direct appeal, "[t]he minimum for determining whether a waiver was knowing and intelligent is a record which shows that the accused was made aware of the dangers and disadvantages of self-representation, and that he understood the consequences of his choice," and not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

California: Cal. Penal Code § 1018 ("No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and unless the court shall find that the defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel."); *People* v. *Paradise*, 108 Cal. App. 3d. 364, 366, 166 Cal. Rptr. 484, 485 (1980) ("The issue is whether before accepting a guilty plea to a misdemeanor a trial court must expressly advise a defendant who appears without counsel of the dangers and risks of self-representation. We hold that such advisement need not appear of record so long as the record as a whole shows that the express waiver of counsel was intelligent and with understanding.").

Colorado: *People* v. *Arguello*, 772 P.2d 87, 95-96 (Colo. 1989) (holding that a judge should go through a detailed colloquy with a defendant including advising of the dangers of self-representation, but stating "A court's failure to comply substantially with this requirement does not automatically render the waiver invalid, but is an exception which should rarely be invoked."); but see *Martinez v. People*, 166 Colo. 132, 134-35, 442 P.2d 422, 423 (1968) (upholding waiver even though defendant was informed only that he had a right to counsel); *People* v. *Smith*, 881 P.2d 385, 389 (Colo. App. 1994) (minor omissions from inquiry discussed in Arguello did not render wavier invalid).

Connecticut: *State* v. *Day*, 233 Conn. 813, 822, 661 A.2d 539, 547 (1995) (stating that a trial judge may not accept a waiver of counsel for trial proceedings unless the defendant "'[h]as been made aware of the dangers and disadvantages of self- representation,'" but not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

Delaware: Del. Super. Ct. Crim. R. 44 ("Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned . . . unless, after the court has advised the defendant of the dangers and disadvantages of acting pro se and has found the defendant competent to do so, the defendant waives such appointment."); *Briscoe* v. *State*, 606 A.2d 103, 107-08 (Del. 1992) (holding that a judge must advise defendant of the perils of acting *pro se* but not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

District of Columbia: *McClinton* v. *United States*, 817 A.2d 844, 849 (D.C. 2003) (holding that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open" and that a defendant's waiver "must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and the circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter," but not requiring reversal simply because the judge does not give an instruction) (internal quotations and citations omitted), *petition for cert. filed*, No. 03-7227 (U.S. Oct. 29, 2003).

Florida: Fla. R. Crim. P. 3.111(d) (stating that before accepting a waiver of counsel, "the court shall advise the

defendant of the disadvantages and dangers of self-representation" but not requiring any specific inquiries); *Clary* v. *State*, 818 So. 2d 686 (Fla. Dist. Ct. App. 2002) (reversing for the failure to conduct a *Faretta*-style inquiry but not requiring any specific admonishments).

Georgia: *King* v. *State*, 226 Ga. App. 576, 584, 486 S.E.2d 904, 911 (1997) ("Each plea further recites that defendant 'freely and voluntarily waive[d] [her] right to counsel[;]' that she had read the accusation and the plea statement; and that the trial court was 'satisfied that the Defendant understands all [her] rights. . . .' We hold the record of these guilty pleas is adequate for an appellate court to affirm the trial court's determination, i.e., that defendant's waiver of the right to counsel was knowingly and intelligently made as part of a free and voluntary guilty plea.") (alterations and omissions in original), *rev'd on other grounds*, 270 Ga. 367, 509 S.E.2d 32 (1998).

Hawai'i: *State* v. *Merino*, 81 Haw. 198, 221-22, 915 P.2d 672, 695-96 (1996) (holding a judge did not need to "administer a criminal procedure course" before the defendant could waive counsel).

Idaho: Idaho Rules of Court, Crim. R. 44(a) ("Every defendant, who according to law is entitled to appointed counsel, shall have counsel assigned to represent the defendant, from initial appearance before the magistrate or district court, unless the defendant waives such appointment."); *State* v. *Maxey*, 125 Idaho 505, 509, 873 P.2d 150, 154 (1994) ("We are not convinced, however, that the judgments that confront a defendant who pleads guilty in a misdemeanor case are sufficiently difficult to warrant a requirement that the trial court must advise the defendant of the problems inherent in entering a plea without counsel.").

Illinois: Ill. Sup. Ct. R. 401 (providing that waiver of counsel shall occur in open court and only after the trial judge informs defendant of the nature of the charges, the minimum

and maximum sentences, and his right to counsel); *People* v. *Christensen*, 197 Ill. App. 3d 807, 814-15, 555 N.E.2d 422, 426-27 (1990) (holding that defendant properly waived her right to counsel because the judge followed the instructions of Rule 401 and did not give the specific admonishments now required by the Iowa Supreme Court).

Indiana: *Shelton* v. *State*, 181 Ind. App. 50, 55, 390 N.E.2d 1048, 1051 (1979) ("While it is better practice for the trial judge to emphasize the importance of the assistance of counsel and that counsel would assist the accused in evaluating the state's case against him, the possible defenses, if any, to the charge and the advantages and disadvantages of the alternative pleas, the failure to so advise is not per se reversible error. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case. . . .").

Iowa: Iowa Code, R. Crim. P. 2.28 ("Every defendant who is an indigent person as defined in Iowa Code section 815.9, is entitled to have counsel appointed to represent the defendant at every stage of the proceedings from the defendant's initial appearance before the magistrate or the court through appeal, including probation revocation hearings, unless the defendant waives such appointment.").

Kansas: Kan. Stat. Ann. § 22-4503 (establishing the right to counsel for criminal defendants); *State* v. *Armstrong*, 240 Kan. 446, 453-54, 731 P.2d 249, 255-56 (1987) (applying a *Faretta*-style inquiry for a waiver at a trial, and expressing that the validity of a waiver "depends upon the particular facts and circumstances surrounding each case, including the accused's background, experience and conduct" and not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

Kentucky: Ky. R. Crim. P. 3.05(2) ("If the crime of which the defendant is charged is punishable by confinement and the

defendant is financially unable to employ counsel, the judge shall appoint counsel to represent the defendant unless he or she elects to proceed without counsel."); *Dunn* v. *Commonwealth*, 573 S.W.2d 651, 652-53 (Ky. 1978) (rejecting defendant's argument that his waiver of counsel at trial was invalid because "the trial judge should have advised him of the seriousness of the charges and of the advisability of being represented by skilled counsel.").

Louisiana: Louisiana Stat. Ann., Code of Crim. P. art. 511 ("The accused in every instance has the right to defend himself and to have the assistance of counsel."); *State* v. *Strain*, 585 So. 2d 540, 543-44 (La. 1991) (holding that before a judge accepts a waiver of counsel at the guilty plea stage of a misdemeanor, the judge should determine on the record that the waiver is knowing and intelligent, and concluding that: "[d]etermining the defendant's understanding of his waiver of counsel in a guilty plea to an uncomplicated misdemeanor requires less judicial inquiry than determining his understanding of his waiver of counsel for a felony trial" and not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

Maine: Me. R. Crim. P. 44(a)(1) ("[T]he court shall advise the defendant of the defendant's right to counsel and assign counsel to represent the defendant at every stage of the proceeding unless the defendant elects to proceed without counsel or has sufficient means to employ counsel."); *State* v. *Morrison*, 567 A.2d 1350, 1352-53 (Me. 1990) (holding that questions of the validity of waiver of counsel should be resolved by case-specific, fact intensive inquiry and stating: "We refuse to create any kind of prophylactic rule by which the conviction of any *pro se* defendant would be automatically vacated, regardless of the particular facts and circumstances surrounding that defendant's waiver of counsel, if the trial court failed to give the defendant

Miranda-like warnings of the risks of self-representation and the benefits of counsel on the record.")

Maryland: Maryland Rules of Court, Crim. Causes, R. 4-215(b) ("If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until it determines, after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, that the defendant is knowingly and voluntarily waiving the right to counsel."); *Palacorolle* v. *State*, 239 Md. 416, 419-21, 211 A.2d 828, 829-31 (1965) (noting that "[t]he question of whether there has been a knowing and voluntary waiver is largely a question of fact to be determined as a preliminary matter by the trial judge," and noting that the defendant had not shown that there was a defense that could have been asserted in his case).

Massachusetts: Mass. Rules of Court, R. Sup. Jud. Ct. 3:10 (stating that a defendant shall complete a waiver of counsel form, which does not include a statement of the risks of forgoing counsel); *Commonwealth* v. *Martin*, 425 Mass. 718, 719-20, 683 N.E.2d 280, 282 (1997) ("We have not prescribed the questions that a judge must pose to an accused who desires to represent himself nor is there any particular piece of information that is essential to an effective waiver of counsel.") (internal quotations omitted).

Michigan: Mich. Comp. Laws Ann. § 763.1 ("On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself . . . ."); *People* v. *Dunn*, 380 Mich. 693, 697, 158 N.W.2d 404, 405-06 (1968) (holding that once a defendant was informed of his right to counsel and the charges and then pleaded guilty, he had validly waived his right to counsel); *People* v. *Gonzales*, 179 Mich. App. 477, 480, 446 N.W.2d 296, 298 (1989) ("In district court, a valid waiver of counsel is effected, after the court's presentation of the defendant's right to counsel . . . upon the defendant's

express indication to the court that he chooses to forego the benefits of counsel.").

Minnesota: 49 Minn. Stat. Ann., R. Crim. P. 5.02(3)-(4) (stating that the judge shall not accept a waiver of counsel in a misdemeanor case unless satisfied that it is knowing and intelligent and stating that a judge shall not accept a waiver of counsel in a felony or gross misdemeanor case without first giving the defendant numerous instruction); *State* v. *Rubin*, 409 N.W.2d 504, 506 (Minn. 1987) ("As we interpret R. 5.02 and the comment to the rule, a trial court may not accept a guilty plea to a felony or gross misdemeanor charge made by an unrepresented defendant if the defendant has not consulted with counsel about waiving counsel and pleading guilty.")

Mississippi: Miss. Rules of Court, R. 8.05(3)-(5) (stating that the court may accept waiver of counsel upon a determination that a knowing and intelligent waiver has been granted with an understanding of the following instructions: that the court will not relax evidentiary or procedural rules, nor courtroom protocol for the defendant, that the defendant is bound to conduct himself/herself according to the same rules as an attorney, that these rules are complex, that his/her ability to defend himself/herself will be hampered absent legal advice, and that proceeding pro se usually increases the likelihood of an unfavorable outcome but not requiring that the *judge* give any specific admonishments that would satisfy the Iowa Supreme Court's rule); *Matthews* v. *State* 394 So. 2d 304, 309 (Miss. 1981) (defendant may waive right to counsel "at any time, before or during the trial, but it must be made with a full understanding of its disadvantages and consequences").

Missouri: Mo. Ann. Stat. § 600.051 (stating that a judge may accept a signed waiver of counsel if the defendant has been informed of the nature of the charges, that the defendant has right to trial by jury, the maximum and minimum permissible punishment, that any recommendations from the prosecutor is not binding, that the defendant will most likely

be imprisoned, and that if indigent the defendant has a right to appointed counsel and not requiring any specific inquiries of admonishments that would satisfy the Iowa Supreme Court's rule).

Montana: Mont. Code Ann. § 46-8-102 ("A defendant may waive the right to counsel when the court ascertains that the waiver is made knowingly, voluntarily, and intelligently."); see generally *State* v. *Markuson*, 317 Mont. 43, 75 P.3d 298 (2003) (rejecting the defendant's argument that he had not validly waived his right to counsel because the judge had failed to advise him of the dangers and disadvantages of self-representation); *State* v. *Wolfe*, 317 Mont. 173, 75 P.3d 1271 (2003) (same).

Nebraska: *State* v. *Green*, 185 Neb. 673, 178 N.W.2d 271 (1970) (upholding a waiver of counsel in a case where defendant was not warned that a defense attorney could give an independent perspective or that a defense attorney might recognize defenses he would not).

Nevada: Nev. Rev. Stat. 178.397 ("Every defendant accused of a gross misdemeanor or felony who is financially unable to obtain counsel is entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before a magistrate or the court through appeal, unless he waives such appointment."); *Beals* v. *State*, 106 Nev. 729, 732, 802 P.2d 2, 4 (1990) (per curiam) ("The court should determine if the waiver is knowingly and intelligently made with a penetrating and comprehensive examination of the waiver and the circumstances surrounding it" but not requiring any specific admonishments) (internal quotations omitted).

New Hampshire: N.H. Rev. Stat. Ann. § 604-A:2(I) ("Unless the defendant waives the appointment of counsel, if the defendant indicates to the court that he is financially unable to obtain counsel, the court shall instruct the defendant to complete a financial affidavit in such form as designated by

the unit of cost containment."); *State* v. *Herbert*, 108 N.H. 332, 334-35, 235 A.2d 524, 526-27 (1967) (noting that deciding whether waiver was valid is a fact-intensive process and not requiring judge to give any specific admonishments).

New Jersey: *State* v. *Williams*, 663 A.2d 1378, 1388-89 (N.J. Super. Ct. Law Div. 1995) ("Defendant should be informed of the nature of the charges he faces, the statutory defenses to those charges, the possible range of allowable punishment, the technical problems he may face in acting as counsel . . . ." *except*, "when the record indicates that defendant actually understands the risks of proceeding *pro se*.")

New Mexico: *State* v. *Montler*, 85 N.M. 60, 60-61, 509 P.2d 252, 252-53 (1973) ("with regard to waiver of counsel, no hard and fast rule can be laid down as to what must be stated in each case in order to adequately explain an accused's rights before permitting him to waive counsel. Each case must be decided on its own peculiar facts which shall include consideration of the background, education, training, experience and conduct of the accused").

New York: *People* v. *Whitted*, 496 N.Y.S.2d 767, 770 (N.Y. App. Div. 1985) ("Although the searching inquiry required to establish a knowing and voluntary decision to proceed *pro se* can best be established by an appropriate colloquy . . . there is no authority for the proposition that such a colloquy is the exclusive method that may be used to establish the effectiveness of the waiver.") (citation omitted); *People* v. *White*, 451 N.Y.S.2d 57, 61 (N.Y. 1982) (court may grant waiver of counsel only where it has first "undertaken a sufficiently searching inquiry for it to be reasonably assured that the defendant appreciated the 'dangers and disadvantages' of giving up the fundamental right to counsel").

North Carolina: N.C. R. Indigent Def. Servs. R. 1.6(a) ("[W]aiver of counsel shall be effective only if the court finds

of record that at the time of waiver the indigent person acted with full awareness of his or her rights and of the consequences of the waiver. In making such a finding, the court shall follow the requirements of G.S. 15A-1242 and shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the matter."); N.C. Gen. Stat. § 15A-1242 (waiver of counsel contingent upon trial judge being satisfied, after thorough inquiry that: defendant (1) has been advised of right to assistance and assignment of counsel; (2) understands and appreciates the consequences of waiver; and (3) comprehends the nature of charges, proceedings, and range of permissible punishment, but not requiring any specific admonishments that would satisfy the Iowa Supreme Court's rule); *State* v. *Fulp*, 355 N.C. 171, 176-77, 558 S.E.2d 156, 159-60 (2002) (upholding the use of prior conviction for enhancement even though there was no evidence that prior judge gave the specific admonishments now required by the Iowa Supreme Court).

North Dakota: N.D. R. Crim. P., R. 44(a) (stating that, "[a]bsent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent the defendant at every stage of the proceedings from initial appearance before a magistrate through appeal in the courts of this state in all felony cases." and recognizing that this right applies to non-felony cases where a magistrate has not determined that a sentence upon conviction will not include imprisonment); *State* v. *Hendrick*, 543 N.W.2d 217, 221 (N.D. 1996) (treating the question of whether a waiver of counsel was voluntary as a fact-intensive question and upholding a waiver where there was no evidence that the judge gave the specific admonishments now required by the Iowa Supreme Court).

Ohio: Ohio Rev. Code Ann. § 2941.021 ("Any criminal offense which is not punishable by death or life imprisonment

may be prosecuted by information filed in the common pleas court by the prosecuting attorney if the defendant, after he has been advised by the court of the nature of the charge against him and of his rights under the constitution, is represented by counsel or has affirmatively waived counsel by waiver in writing and in open court prosecution by indictment."); *State* v. *Welch*, 28 Ohio St. 2d 31, 32-33, 274 N.E.2d 756, 757-58 (1971) (remanding a case for a hearing to determine whether a defendant knowingly and intelligently waived his right to counsel in a prior case but not requiring any specific inquiries or admonishments that would satisfy the Iowa Supreme Court's rule on remand).

Oklahoma: Okla. Stat. Ann. tit. 22, § 251 ("When the defendant is brought before a magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and also of his right to waive an examination before any further proceedings are had."); *Huckabay* v. *Page*, 438 P.2d 645, 647 (Okla. Crim. App. 1968) (upholding the waiver of counsel at a guilty plea when defendant was informed of his right to counsel and the possible punishment range); *Fitzgerald* v. *State*, 972 P.2d 1157, 1162 (Okla. Crim. App. 1998) ("This Court has consistently refused to impose a list of factors on trial courts, holding instead that a valid waiver is determined from the total circumstances of each case.")

Oregon: *State* v. *Meyrick*, 313 Or. 125, 134, 831 P.2d 666, 671 (1992) (en banc) (holding that the Oregon Constitution's provision of the right to counsel "does not require a catechism by the trial court, however, before the right to counsel may be validly waived by a defendant. The failure of a trial court to impart a particular piece of information to a defendant will not, of itself, require reversal of a conviction if the record as a whole shows that the defendant knew of his or her right to

counsel and that the waiver of counsel was an intentional relinquishment or abandonment of that known right.")

Pennsylvania: *Commonwealth* v. *Payson*, 723 A.2d 695, 700 (Pa. Super. Ct 1998) (indicating that an effective waiver of counsel requires a colloquy involving inquiry into the following areas: (1) the defendant understands he has the right to counsel; (2) the defendant understands the nature of the charges against him; (3) the defendant is aware of the sentencing range; (4) the defendant understands he will be bound by all the normal rules of procedure and that counsel would be familiar with these rules; (5) defendant understands that there are possible defenses to these charges which counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and (6) the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, the objection to these errors may be lost permanently).

Rhode Island: R.I. R. Super. Ct. 44 ("If a defendant appears in Superior Court without counsel, the court shall advise the defendant of his or her right to counsel and assign counsel to represent the defendant at every stage of the proceeding unless the defendant is able to obtain his or her own counsel or elects to proceed without counsel."); *State* v. *Briggs*, 787 A.2d 479, 485 (R.I. 2001) (applying a totality of the circumstances test to the question of waiver of counsel and not mandating any specific admonishments)

South Carolina: S.C. Code Ann. § 17-3-10 (Recognizing the right to counsel as required by the United States Constitution.) *Watts* v. *State*, 347 S.C. 399, 402-03 556 S.E.2d 368, 370-71 (2001) (holding that "[i]n order to waive the right to counsel, the accused must be (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation" and finding that the trial judge failed to apprise the defendant of the dangers of self-representation.)

(internal quotations omitted); *Gardner* v. *State*, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87(S.C. 2002)(finding an "absolute failure of the plea judge to ask Petitioner for a waiver and to apprise him of the dangers of appearing *pro se*" the South Carolina supreme court looked to the defendant's background to decide if the defendant had sufficient background to understanding the dangers of self-representation).

South Dakota: *State* v. *Cashman*, 491 N.W.2d 462 (S.D. 1992) (holding that when a guilty plea is entered, a full *Faretta* colloquy is not required and not requiring the specific admonishments now required by the Iowa Supreme Court).

Tennessee: Tenn. R. Crim. P. 44(a) ("The court shall . . . determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience and conduct of the accused and such other matters as the court may deem appropriate." Furthermore, a written waiver is required and the court must "spread [the waiver] upon the minutes of the court and [make the waiver] a part of the record of the cause."); *State* v. *Armes*, 673 S.W.2d 174 (Tenn. Crim. App. 1984) (holding that the waiver must be in writing in order to be valid but not requiring the specific admonishments required by the Iowa Supreme Court).

Texas: Tex. Crim. Proc. Code Ann. art. 1.051(g) ("If a defendant wishes to waive his right to counsel, the court shall advise him of the dangers and disadvantages of self-representation."); *Hatten* v. *State*, 71 S.W.3d 332, 334 (Tex. Crim. App. 2002) (holding that a *Faretta* style inquiry is not required for guilty pleas).

Utah: Utah R. Crim. P. 8(a) ("A defendant charged with a public offense has the right to self representation, and if indigent, has the right to court-appointed counsel if the defendant faces a substantial probability of deprivation of liberty."); *State* v. *Arguelles*, 63 P.3d 731 (Utah 2003) (stating that a *Faretta*-style inquiry is preferred, but holding that the

waiver was valid nonetheless under a totality-of-the-circumstances test).

Vermont: Vt. Stat. Ann. tit. 13, § 5237 (A defendant may waive the right to counsel, in writing, or by other record, "if the court, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education, and familiarity with the English language, and the complexity of the crime involved.") *State* v. *Bean*, 163 Vt. 456, 460-61, 658 A.2d 940, 943 (1995) (holding that while waiver should generally appear in the record, "in a relatively close case the record may be supplemented to show defendant's actual knowledge and understanding" and not requiring specific admonishments).

Virginia: *Edwards* v. *Commonwealth*, 21 Va. App. 116, 124, 462 S.E.2d 566, 570 (1995) ("Signing a waiver form does not alone guarantee affirmance of a conviction, and failure to give the specific warnings suggested by appellant does not alone assure reversal of the conviction. All of the circumstances as shown by the record must be considered and an ultimate determination made whether the accused knowingly, competently, and intelligently waived his right to be represented by an attorney.").

Washington: Wash. Crim. R. Limited Jurisdiction 4.1(c)(2) ("If the defendant chooses to proceed without a lawyer, the court shall determine on the record that the waiver is made voluntarily, competently and with knowledge of the consequences."); *State* v. *Meacham*, 98 Wash. App. 1040 (1999), *available at* 1999 WL 1222707, at * 3, (holding that while a *Faretta*-style inquiry is preferred, absent a colloquy a waiver can be knowing if the record indicates "that the defendant had at least a minimal knowledge of what the task of self-representation entails, including that the defendant understood the seriousness of the charges and knew the maximum penalty.")

West Virginia: W. Va. Code §§ 62-3-1, 62-3-1a (providing for the right to counsel, upon request and providing waiver forms that *pro se* defendants must sign when entering guilty plea, which states only that they understand their right to counsel, the charges against them, and potential penalties that may result); *State* v. *Armstrong*, 175 W.Va. 381, 388, 332 S.E.2d 837, 843 (1985) (holding that express waiver of right to counsel—through a waiver form which states that defendant understands his right to counsel—completed at time of guilty plea was sufficient for the conviction to operate as an enhancement in a subsequent DUI conviction), *overruled on other grounds by State* v. *Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994).

Wisconsin: Wis. Stat. § 970.02(1)(b) (requiring trial judge to inform defendant of right to appointment of counsel); *State* v. *Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716, 721 (Wis. 1997) (holding that to prove a knowing and voluntary waiver of a defendant's right to counsel in any case in which defendant seeks to proceed *pro se*, "the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him."); *State* v. *Polak*, 254 Wis. 2d 585, 600, 646 N.W.2d 845, 852 (Wis. Ct. App. 2002) (holding that oral colloquy, supplemented by waiver forms signed by defendant was sufficient to satisfy the *Klessig* test).

Wyoming: Wyo. Stat. Ann. § 7-6-107 ("A person who has been advised of his rights under W.S. 7-6-105 may waive any right provided by this act if at the time of or after waiver, the court finds that the person has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise made according to law. Before making its findings, the court shall consider such factors as the person's age,

education, familiarity with the English language and the complexity of the crime involved."); *Mapp* v. *State*, 953 P.2d 140, 144 (Wyo. 1998) ("district court's failure to conduct a complete inquiry on the record does not require reversal when the surrounding facts and circumstances demonstrate a knowing and intelligent waiver").